Supreme Court, U.S.
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No. 01-543

IN THE
Supreme Court of the United States

GLOBAL NAPS, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION OF VERIZON

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QUESTION PRESENTED

Whether the D.C. Circuit, in the particular circumstances of this case, correctly upheld the FCC's determination that an indeterminate tariff, filed in violation of the agency's rules, was void *ab initio*.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, the Verizon telephone companies* state the following:

Verizon Communications Inc. is the ultimate parent of each of the respondent Verizon telephone companies. No publicly owned company owns 10% or more of the stock of Verizon Communications Inc.

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* The Verizon telephone companies are the affiliated local telephone companies of Verizon Communications Inc., which include the telephone companies formerly affiliated with GTE Corporation. None of the Verizon telephone companies formerly affiliated with GTE Corporation was a party in the court of appeals. The following Verizon telephone companies were intervenors in the court of appeals: Verizon Delaware Inc. (f/k/a Bell Atlantic-Delaware, Inc.), Verizon Maryland Inc. (f/k/a Bell Atlantic-Maryland, Inc.), Verizon New England Inc. (f/k/a New England Telephone and Telegraph Company), Verizon New Jersey Inc. (f/k/a Bell Atlantic-New Jersey, Inc.), Verizon New York Inc. (f/k/a New York Telephone Company), Verizon Pennsylvania Inc. (f/k/a Bell Atlantic-Pennsylvania, Inc.), Verizon Virginia Inc. (f/k/a Bell Atlantic-Virginia, Inc.), Verizon Washington, DC Inc. (f/k/a Bell Atlantic-Washington, D.C., Inc.), and Verizon West Virginia Inc. (f/k/a Bell Atlantic-West Virginia, Inc.).

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BRIEF IN OPPOSITION OF VERIZON

The Verizon telephone companies respectfully oppose the petition for a writ of certiorari filed by Global NAPs, Inc. ("GNAPs"). In the agency orders underlying the decision of the D.C. Circuit, the Federal Communications Commission ("FCC") held that provisions of GNAPs' filed tariff were invalid on their face because they were "unjust and unreasonable under section 201(b)" of the Communications Act of 1934, 47 U.S.C. § 201(b). Pet. App. 37a; *see also id.* at 16a, 29a. The court of appeals affirmed that conclusion, holding that GNAPs' tariff was a "patently unlawful" attempt "to game the existing rules." *Id.* at 13a-14a.

GNAPs challenges neither the legal standard applied by the court below nor the determination that GNAPs' filed tariff was unlawful. Nor does GNAPs challenge the FCC's authority to declare a filed tariff void *ab initio* under appropriate circumstances. Instead, GNAPs claims only that, under the particular circumstances of this case, the court of appeals, applying the standard set forth in *ICC v. American Trucking Associations, Inc.*, 467 U.S. 354 (1984), erred

in affirming the FCC's conclusion that the tariff was void *ab initio*. Such fact-specific application of an unchallenged legal standard does not merit review by this Court. In any event, GNAPs' challenge to the holding in this case is without merit. The Court should deny the petition.

STATEMENT OF THE CASE

1. This case is an obscure skirmish in a continuing regulatory battle over implementation of one provision of the Telecommunications Act of 1996 (the "1996 Act"), 47 U.S.C. § 251(b)(5). Section 251(b)(5) requires local exchange carriers ("LECs") to establish "reciprocal compensation" arrangements for the transport and termination of certain types of telecommunications traffic. In a reciprocal compensation arrangement, when caller A (served by carrier X) calls end-user B (served by carrier Y), carrier X pays carrier Y to complete the call. Local telephone companies (also called "local exchange carriers") must include reciprocal compensation arrangements in the "interconnection agreements" that they negotiate under the 1996 Act. *See* 47 U.S.C. § 251(c)(1).

Reciprocal compensation does not apply, however, to interstate access calls, including exchange access and information access calls. *See* Order on Remand and Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 16 FCC Rcd 9151 (2001) (*"ISP Remand Order"*), *petitions for review pending*, Nos. 01-1218, *et al.* (D.C. Cir.).[1] In particular, as the FCC has recently reiterated, reciprocal compensation does not apply to calls placed to the Internet through an Internet service provider ("ISP") like AOL. *Id.* at 9152-53, ¶ 1. Moreover, because calls to the Internet flow in only one direction (and are in no sense "reciprocal"), the FCC has

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[1] Roughly speaking, the distinction is between purely local calls — which are subject to reciprocal compensation — and calls that continue to points outside the local calling area — which are not.

concluded that requiring payments on these calls fosters uneconomic arbitrage and discourages local telephone competition. *Id.* at 9181-86, ¶¶ 67-76. Indeed, in those circumstances, a competing carrier that signed up its own local telephone customers would both lose the ability to reap these arbitrage payments and risk having to make such payments to other carriers to boot. As a result, the FCC has concluded that such payments "undermine the operation of competitive markets" by rewarding carriers "that compete, not on the basis of the quality and efficiency of the services they provide, but on the basis of their ability to shift costs to other carriers." *Id.* at 9183, ¶ 71.

Nevertheless, prior to the FCC's most recent order, the FCC declined to pre-empt state commission authority over inter-carrier compensation for Internet-bound traffic. As a result, a number of state commissions, relying on a mistaken understanding of section 251(b)(5), had required incumbent LECs — companies like Verizon — to pay reciprocal compensation on one-way calls to the Internet. The decisions by state regulators were mixed, however, and other state commissions rejected a requirement to make reciprocal compensation payments for Internet-bound traffic. Among the latter, the Massachusetts Department of Telecommunications and Energy (the "DTE"), reversing its own earlier order, recognized that Internet-bound traffic is not subject to reciprocal compensation, and that "unqualified payment of reciprocal compensation for ISP-bound traffic . . . does not promote real competition in telecommunications" but instead provides "an unintended arbitrage opportunity . . . . A loophole, in a word." Order, *MCI WorldCom, Inc. v. New England Tel. & Tel. Co.*, D.T.E. 97-116-C, 1999 WL 634357, at *15 (Mass. Dep't of Telecomms. & Energy May 26, 1999).[2] In states, like

[2] The FCC has affirmed that such decisions are correct, and has effectively barred the payment of reciprocal compensation for Internet-bound traffic in those states where such compensation

Massachusetts, where reciprocal compensation was not required for Internet-bound calls, all carriers were required to recover their costs from their own customers — just as Verizon and other incumbent LECs have always been required to do. *ISP Remand Order*, 16 FCC Rcd at 9188, ¶ 80.

2. GNAPs is among the companies that have exploited the "regulatory arbitrage" opportunity (*id.* at 9184, ¶ 74) created by state commission decisions requiring payment of reciprocal compensation on one-way calls bound for the Internet. At some point, GNAPs recognized that the "windfall" provided by such payments (*id.* at 9183, ¶ 70) would be eliminated when state commissions conformed their interpretation of carriers' reciprocal compensation obligations to the requirements of federal law. In an attempt to forestall this result, GNAPs filed a federal tariff containing the provisions at issue in this case.

The underlying purpose of GNAPs' tariff is clear — to ensure the continued flow of reciprocal compensation payments on calls to the Internet without regard to the contrary determinations of state public utility commissions. To this end, GNAPs' tariff provided in relevant part:

> This tariff applies to all ISP-bound traffic for which [GNAPs] does not receive compensation from the Delivering LEC under the terms of an interconnection agreement entered into pursuant to Sections 251 and 252 of the Communications Act of 1934, as amended (an "Interconnection Agreement").

Pet. App. 87a (GNAPs Tariff FCC No. 1, at 82, § 7A.1).

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was not required under state commission decisions as of April 2001. *ISP Remand Order*, 16 FCC Rcd at 9188, ¶ 80 & n.152. This case addressed only the period prior to that order.

GNAPs' tariff is a "heads-I-win, tails-you-lose" tariff. If state commissions required a "Delivering LEC" to pay reciprocal compensation, fine; if not, then the "Delivering LEC" must pay anyway under the federal tariff, despite a contrary state commission determination.

3. On July 8, 1999, after GNAPs attempted, pursuant to its federal tariff, to bill Verizon for Internet-bound traffic originated by Verizon in Massachusetts, Verizon filed the complaint that gave rise to this proceeding.[3] Verizon claimed, among other things, that GNAPs' tariff was unjust and unreasonable in violation of section 201(b).[4] On December 2, 1999, the Commission granted the complaint and ruled that GNAPs' tariff was void *ab initio* for two reasons. First, the tariff applies only if the "Delivering LEC" does not pay reciprocal compensation "under the terms of an interconnection agreement" — the state-supervised documents that govern the implementation of the 1996 Act by incumbent LECs like Verizon and competitive LECs like GNAPs. Because (in every relevant case) the question whether reciprocal

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[3] Verizon had not previously been aware of GNAPs' tariff, the relevant provisions of which were buried at pages 81-83 of a 150-page tariff. Indeed, GNAPs' position was that merely by continuing to deliver traffic to GNAPs — something that Verizon was required to do under binding federal law — Verizon somehow "ordered" GNAPs' "service" and triggered a payment obligation under the tariff.

[4] Verizon raised several other issues as well. For example, Verizon pointed out that GNAPs' tariff is inconsistent with the FCC's long-standing policy governing arrangements — like the one at issue here — for the joint provision of interstate access. The FCC has long held that carriers must share any per-minute access charges received from the access user for the provision of such service; LECs do not compensate one another in that circumstance. GNAPs had insisted that this rule did not apply to Internet-bound traffic, which, it argued, was local and subject to reciprocal compensation for that reason. GNAPs' claim — embodied in its tariff — that Internet-bound traffic was interstate access traffic but nonetheless subject to payment of reciprocal compensation was both legally incoherent and inconsistent with the position that it had taken elsewhere.

compensation was required "under the terms of an interconnection agreement" was subject to litigation and not yet resolved, GNAPs' tariff was indeterminate. "The contingent and unclear applicability of the tariff defies the Commission's longstanding interpretation of section 201(b) of the Act, as reflected in [47 C.F.R. §] 61.2." Pet. App. 55a. Second, the Commission found that the tariff violated one of the Commission's rules implementing section 201(b), that is, 47 C.F.R. § 61.74(a), which prohibits tariffs from referring to "any other document or instrument." *See* Pet. App. 56a; *see also id.* at 32a.

GNAPs filed a petition for reconsideration principally raising procedural objections that are not relevant here. The FCC denied the petition on March 22, 2000. *Id.* at 15a-35a.

4. The D.C. Circuit denied GNAPs' subsequent petition for review. *Id.* at 1a-14a. After disposing of GNAPs' procedural arguments, the court upheld the FCC's determination that GNAPs' tariff contained an illegal cross-reference, holding that "it is unmistakable that the application of the tariff is contingent upon whether GNAPs is paid 'under the terms of an interconnection agreement.'" *Id.* at 10a. "The tariff, on its face, violates the FCC's rule." *Id.* The court likewise affirmed the FCC's conclusion "that the tariff violates 47 C.F.R. § 61.2(a) which provides that tariffs must be clear and explicit." *Id.* at 10a-11a. Because the application of GNAPs' tariff was contingent on the outcome of pending administrative and judicial proceedings, "a party could not reasonably ascertain the 'proper application' of the tariff at the time it was filed." *Id.* at 11a. For this reason, the FCC properly concluded that "the tariff was unclear and therefore was invalid." *Id.* GNAPs does not challenge those conclusions here.

The court of appeals likewise rejected GNAPs' argument that the FCC had erred by "'retroactively invalidating' the tariff." *Id.* at 12a. The court noted that

GNAPs itself had acknowledged that "'[a] tariff that is so plainly defective as to be a legal nullity may be declared retroactively invalid — *void ab initio* — in order to ensure that an injustice is not worked on the affected customers.'" *Id.* at 13a (quoting GNAPs' D.C. Cir. Br. at 36). The court concluded:

> That was the case here. The FCC found that the tariff, on its face, violated the plain meaning of the FCC's tariff regulations and therefore was unlawful from the date of issuance. This is sufficient to satisfy the test laid out in *American Trucking Ass'ns* as the FCC voided a tariff in furtherance of a "specific statutory mandate" to which the action was "directly and closely tied." 467 U.S. at 367.

Id. at 13a. The fact that "GNAPs sought to game the existing rules, and lost, does not mean the FCC was arbitrary and capricious in its application of its own rules." *Id.* at 14a.

REASONS FOR DENYING THE WRIT

I. PETITIONER'S CHALLENGE TO THE FACT-SPECIFIC APPLICATION OF AN ACCEPTED LEGAL STANDARD PRESENTS NO ISSUE WORTHY OF REVIEW

GNAPs admits that, under this Court's decision in *American Trucking*, "the FCC may retroactively cancel a tariff . . . if exercising that authority in a particular case furthers a specific statutory mandate and is directly and closely tied to that mandate." Pet. 4. In the decision below, the D.C. Circuit held that the FCC had properly determined that GNAPs' tariff was void *ab initio* "in furtherance of a 'specific statutory mandate' to which the action was 'directly and closely tied.'" Pet. App. 13a (quoting *American Trucking*, 467 U.S. at 367). GNAPs' petition thus rests on the claim that the court of appeals erred in the application of a legal standard that GNAPs itself asserts is correct. GNAPs' petition is

thus a paradigm case where "the asserted error consists of . . . the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

GNAPs attempts to manufacture a legal issue by arguing that this case presents the question whether a tariff can be invalidated under the *American Trucking* standard solely for violating an agency regulation. Pet. 14. That question is simply not presented here, however, because the FCC made abundantly clear that GNAPs' tariff was invalidated because it was unjust and unreasonable under section 201(b) of the Communications Act. *See* Pet. App. 37a ("the challenged provisions . . . are unjust and unreasonable under section 201(b) of the Act"); *id.* at 55a ("[t]he contingent and unclear applicability of the tariff defies the Commission's long-standing interpretation of section 201(b) of the Act"); *id.* at 57a (tariff "unlawful under section 201(b) of the Act"); *id.* at 29a (tariff not "sufficiently definite to comply with section 201 of the Act"); *id.* at 32a (noting that 47 C.F.R. § 61.74(a) "implement[s] section 201(b) of the Act"). The D.C. Circuit recognized this as well. *Id.* at 6a ("[T]he FCC declared GNAPs' tariff unlawful under section 201(b) and *void ab initio*."). GNAPs' claim that the FCC invalidated its tariff "merely because it conflicted with the FCC's own regulations" (Pet. 4) is thus inconsistent with the explicit terms of the decisions below.

GNAPs itself conceded before the court of appeals that if its tariff was "'so plainly defective as to be a legal nullity'" it "'may be declared retroactively invalid.'" Pet. App. 13a (quoting GNAPs' D.C. Cir. Br. at 36). The court duly noted the concession and found that GNAPs' tariff flunked that test. *Id.* Accordingly, GNAPs cannot plausibly argue that the D.C. Circuit applied the wrong legal standard in deciding the case below, because the court accepted GNAPs' *own* formulation of that legal standard. The court simply did not agree with GNAPs' application of that standard to the circumstances of this

case. GNAPs' petition thus does not satisfy the standards for review in this Court.

II. GNAPs' PETITION IS MERITLESS

The D.C. Circuit held that the FCC had acted within its authority when it invalidated *ab initio* a tariff that facially violated the FCC's implementing rules. That decision is correct.

For purposes of its petition, GNAPs does not contest that the FCC correctly concluded that its tariff facially violated two FCC regulations. The first of these regulations, 47 C.F.R. § 61.2(a), embodies the basic principle that a tariff must be sufficiently clear and explicit "to remove all doubt as to their proper application." The second regulation, 47 C.F.R. § 61.74(a), prohibits cross-references to documents outside of the tariff itself. As a result of these deficiencies, GNAPs' tariff failed to provide potential "customers" notice of the terms under which GNAPs would provide "service."

Accordingly, this case is controlled by *Security Services, Inc. v. K Mart Corp.*, 511 U.S. 431, 443 (1994). There, the Court upheld a district court's refusal to enforce a tariff where the filing carrier had failed to maintain effective participation in an industry mileage guide. The lower court had based its decision on an Interstate Commerce Commission regulation that provided that such a defect rendered a tariff "'void as a matter of law.'" *Id.* at 436 (quoting 49 C.F.R. § 1312.4(d) (1993)). The Court affirmed, noting that such a regulation did not work any retroactive invalidation, and the *American Trucking* test did not apply. Rather, "once cancellation of participation is published, . . . the mileage-based tariff is incomplete, and 'cease[s] to satisfy the fundamental purpose of tariffs: to disclose the freight charges due to the carrier.'" *Id.* at 437. "[I]n effect [the carrier] had no rates on file because its tariff lacked an essential element." *Id.* at 440.

The same is true here: because GNAPs' tariff was, by its terms, contingent on the outcome of other regulatory and judicial proceedings, the tariff failed to disclose the charges due under the tariff and GNAPs was not entitled to rely on it — it was void upon filing. *Cf. Capital Network Sys., Inc. v. FCC*, 28 F.3d 201, 204 (D.C. Cir. 1994) (FCC may "reject tariff filings summarily" under section 201 when the tariff suffers from "technical or procedural flaws") (citing *Municipal Light Boards v. FPC*, 450 F.2d 1341, 1346 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 989 (1972)); *see also id.* at 209 (Williams, J., dissenting) ("Once the Commission reasonably finds a tariff in violation of its clear statement rules, it has authority to reject the tariff outright.").

Moreover, even if — as GNAPs argues and the D.C. Circuit assumed below — the *American Trucking* standard for retroactive invalidation applies, this case easily satisfies that standard. As the FCC made clear in its initial order below, the requirement that a tariff be clear and explicit reflects "the Commission's long-standing interpretation of section 201(b) of the Act." Pet. App. 55a. Despite GNAPs' arguments, in other words, the requirement embodied in 47 C.F.R. § 61.2(a) *is* a requirement imposed by Congress in section 201(b); it is an aspect of Congress's general prohibition on "unjust and unreasonable" practices. Likewise, the FCC made clear that its prohibition on cross-references in 47 C.F.R. § 61.74(a) "implement[s] section 201(b)." *Id.* at 32a.

In holding GNAPs' tariff void *ab initio*, the FCC thus acted in furtherance of the mandate of section 201(b) and in a manner directly and closely tied to that mandate. Because tariffs impose binding legal obligations on those that are subject to their terms, carriers have a special responsibility to ensure that the terms of such tariffs are clear and explicit. As this Court has held, "an incomplete tariff insufficient to support a reliable

calculation of charges" cannot support recovery at all. *Security Services*, 511 U.S. at 443. Otherwise, the tariff itself — by disguising its eventual effect — could promote a carrier's effort to impose unjust and unreasonable charges.

The tariff that GNAPs filed provides a vivid illustration of the risks for regulatory gamesmanship against which the FCC's rules protect. GNAPs' tariff requires compensation *only* if compensation is not *due to be paid* pursuant to an interconnection agreement. Because Verizon's obligation to pay compensation under the controlling interconnection agreements was (and remains) subject to litigation in every relevant case, GNAPs' tariff was indeterminate: it would spring retroactively into effect once GNAPs' claims for compensation under the controlling interconnection agreements were eventually extinguished.[5] As GNAPs must concede for purposes of its petition, it was impossible for parties that are purportedly subject to GNAPs' tariff to tell whether the tariff applied at all. In such circumstances, the D.C. Circuit rightly concluded that the tariff was a "legal nullity" and void when filed.

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[5] Even if it were determined that the parties had *agreed* that no compensation should be paid, GNAPs' tariff would purport to reverse that result — itself a clear violation of 47 U.S.C. § 252(a)(1), which provides that interconnection agreements are "binding."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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